Public Prosecutor v Ooi Lean Chai

HIGH COURT (JOHORE BAHRU) — CRIMINAL TRIAL NO 47-11-80
JAMES FOONG JC
12 JULY 1990

Criminal Law — Dangerous drugs — Trafficking in — Possession — Custody and control — Close proximity of drugs to accused — Rebutting presumption of trafficking — Dangerous Drugs Act 1952, s 39B

Criminal Procedure — Chemist's report — Service — Admissibility of report — Failure of accused to object or give notice to call chemist — Criminal Procedure Code (FMS Cap 6), s 112

The accused was arrested by the police on 18 March 1983 in a flat in Johore Bahru. The police also seized, from the flat, 62 packets of suspected drugs and 67 used and unused syringes. The packets of suspected drugs were sent to the Chemistry Department, Johore Bahru, for analysis and were confirmed to be heroin and 6-monoacetylmorphine. The report was served on the accused on 26 November 1983. The accused was then tried in Criminal Trial No 10-1984 (the 'first trial') for trafficking in heroin and 6-monoacetylmorphine. He was convicted and appealed against his conviction. The Supreme Court ordered a retrial on the ground that 6-monoacetylmorphine was not listed as a dangerous drug at the time of the accused's arrest. In the retrial, the report of the chemist was admitted without objection by the defence. At the end of the prosecution's case, the defence alleged that the chemist's report was wrong and inadmissible as the chemist had not been called. This submission was rejected and the accused was called to enter upon his defence. He testified that the drugs were for his own consumption.

Held, convicting the accused:

(1) Section 399 of the Criminal Procedure Code (FMS Cap 6) did not require the chemist's report to be served more than once to the accused. As the report was the same report served before the first trial, it did not have to be re-served. The defence had not tendered a notice to call the chemist and when the report was tendered the defence counsel did not object. The admissibility of the report cannot then be challenged.

(2) The accused had custody and control of the heroin. He was the only person in the room at the material time. He was the sole subtenant of the room and no other person or persons visited the accused in the said room. The drugs were in close proximity to the accused and the court therefore inferred that he was in possession of the said drugs.

(3) The amount of heroin found was large and did not justify personal consumption. The drugs were also packed in 62 small plastic bags which the court found was an unusual way of storage for personal consumption. The 67 syringes were an unusually large amount for the accused to have in his possession. The accused may be an addict but it did not mean that he was not a trafficker. There was no evidence adduced to show the accused was a chronic addict and that he required a substantial amount of heroin each day for consumption.

(4) The accused had therefore failed to rebut the presumption of trafficking.

[Bahasa Malaysia summary

Si tertuduh telah ditangkap oleh pihak polis pada 18 Mac 1983 di dalam sebuah rumah pangsa di Johore Bahru. Pihak polis juga mengambil 62 bungkusan yang disyaki mengandungi dadah dan 67 penyuntik yang telah digunakan dan yang belum digunakan. Bungkusan-bungkusan yang disyaki mengandungi dadah telah dihantar ke Jabatan Kimia, Johore Bahru, untuk analisa dan telah dipastikan ia adalah heroin dan 6-monoacetylmorphine. Lapuran itu telah disampaikan kepada si tertuduh pada 26 November 1983. Si tertuduh kemudiannya telah dibicarakan di dalam Perbicaraan Jenayah Bil 10-1984 ('perbicaraan pertama') bagi pengedaran heroin dan 6-monoacetylmorphine. Beliau telah disabitkan dan telah merayu terhadap sabitan itu. Mahkamah Agung telah memerintahkan perbicaraan semula atas alasan bahawa 6-monoacetylmorphine tidak disenaraikan sebagai satu dadah berbahaya pada masa si tertuduh ditangkap. Di dalam perbicaraan semula, lapuran ahli kimia telah diterima tanpa bantahan oleh pihak pembela. Di akhir kes pendakwaan, pihak pembela mengatakan bahawa lapuran ahli kimia salah dan tidak boleh diterima kerana ahli kimia tidak dipanggil. Ini telah ditolak dan si tertuduh telah dipanggil membuat pembelaannya. Beliau memberi keterangan bahawa dadah itu adalah untuk kegunaan peribadi.

Diputuskan, mensabitkan si tertuduh:

(1) Seksyen 399 Kanun Acara Jenayah (FMS Cap 6) tidak menghendaki lapuran ahli kimia disampaikan kepada si tertuduh lebih daripada sekali. Memandangkan yang lapuran itu adalah lapuran yang sama yang disampaikan sebelum perbicaraan pertama, ia tidak perlu disampaikan semula. Pihak pembela tidak memberi notis untuk memanggil ahli kimia dan bila lapuran itu dikemukakan, peguambela tidak membuat bantahan. Penerimaan lapuran itu tidak boleh dicabar lagi.

(2) Si tertuduh mempunyai penjagaan dan penguasaan dadah itu. Cuma beliau seorang yang berada di dalam bilik itu pada masa berkenaan. Beliau ialah penyewa kecil tunggal bilik itu dan tiada orang atau orang-orang lain yang melawatnya di dalam bilik itu. Dadah itu berdekatan dengan si tertuduh dan mahkamah lantaran itu membuat kesimpulan bahawa si tertuduh memiliki dadah itu.

(3) Jumlah dadah yang dijumpai adalah besar dan tidak boleh menunjukkan kegunaan peribadi. Dadah itu juga dibungkus di dalam 62 bungkusan kecil dan mahkamah mendapati yang ini adalah cara yang luarbiasa untuk menyimpannya bagi kegunaan peribadi. Penyuntik yang berjumlah sebanyak 67 adalah jumlah yang luarbiasa untuk dimiliki oleh si tertuduh. Si tertuduh mungkin seorang penagih tetapi ini tidak bermakna yang beliau bukan seorang pengedar. Juga tidak ada keterangan yang dikemukakan untuk menunjukkan bahawa si tertuduh adalah seorang penagih yang teruk dan bahawa beliau memerlukan jumlah dadah yang banyak setiap hari untuk kegunaannya.

Cases referred to

1 *Mohamed bin Abdul Rahman* v *PP* [1979] 1 MLJ 252 (folld)
2 *Cohen Lorraine Philis & Anor* v *PP* [1989] 3 MLJ 289 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 399
Dangerous Drugs Act 1952 s 39B

Tan Poh Lai (Miss) (Deputy Public Prosecutor) for the Public Prosecutor.
Teh Poh Teik for the accused.

Cur Adv Vult

James Foong JC: The accused is charged for an offence under s 39B(1) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act.

The charge against the accused is as follows:

> Bahawa kamu pada 18 Ogos 1983 jam lebih kurang 7.30 petang di sebuah bilik di No 34-B, Jalan Abiad, Taman Sri Tebrau, dalam Daerah Johor Bahru, dalam Negeri Johor telah mengedar dadah berbahaya iaitu heroin berjumlah 51.76g dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

The facts of the case are briefly as follows:

On or about 18 August 1983 at or about 7.30pm one Insp Ahmad Mazlan (PW3) together with two other police personnel Mohd Sohod and D/S Mohd Yunus, on information, observed a Chinese youth suspected of trafficking in dadah at Jalan Abiad, Johore Bahru. Following this Chinese youth, Insp Ahmad Mazlan gained entry into a flat known as 34-B, Jalan Abiad with the consent of one Chua Joo Miang (PW 4) who was the landlord of that premises. On enquiring where the Chinese youth who just entered the flat was, PW4 showed Insp Ahmad Mazlan and his men to a room marked E on the sketch plan tendered as exh P37. As the door to room E was not locked, Insp Ahmad Mazlan opened the door and saw the accused in a squatting position in front of a small table. The accused as he later admitted in his own evidence was at that material time taking drugs.

From the said room E which furniture consist of only a bed and a small table, the police party recovered the following items:

(1) Wrapped in newspaper one plastic bag which had 31 small plastic packets (P8(1)-(31)) with suspected drugs therein.
(2) Wrapped in newspaper is one plastic bag which had 16 small plastic packets (P12(1)-(16)) with suspected drugs therein.
(3) Wrapped in newspaper one plastic bag which had 12 small plastic packets (P16(1)-(12)) with suspected drugs therein.
(4) One plastic bag which had three small plastic packets (P19(1)-(3)) with suspected drugs therein.
(5) Four bottle covers (P22A-D).
(6) One spoon (P23).
(7) 67 used and unused syringes and needles (P29(1)-(10); P30(1)-(11)); P31(1)-(14); P32(1)-(12); P34(1)-(13); P35(1)-(7)).

All the relevant exhibits stated above were sent to the Chemistry Department, Johore Bahru for analysis by the investigating officer Insp Jasbir Singh (PW 8) on 21 August 1983. On 24 November 1983, a chemist report marked P38 was received from the chemist together with the same exhibits. This report was forwarded to the accused on or about 26 November 1983 when the accused acknowledged receipt by signing on the rear of P38. This acknowledgement is marked as exh P38A.

At the close of the prosecution's case, the learned defence counsel informed the court that he has only one point to submit relating to the failure of the prosecution to prove its case against the accused. He relied solely on the admissibility of the chemist's report. He based his stand on the fact that the chemist is not called to testify and that the report itself was not correct.

He informed the court that it is due to the incorrect statement in the chemist's report that led to the present trial. This case is a retrial ordered by the Supreme Court after allowing an appeal of the accused in Criminal Trial No 10-1984 (I shall refer to this as the 'first trial'). I was to learn later that the learned trial judge found the accused guilty of an almost similar charge under s 39B(1) of the Dangerous Drugs Act 1952 but of drugs besides heroin included 6-monoacetylmorphine which at the material time was not listed as a dangerous drug under the First Schedule to the Dangerous Drugs Act 1952.

The inclusion of 6-monoacetylmorphine in the charge sheet of the first trial was most likely due to the statement made by the chemist on the last page of the chemist's report which the chemist states as follows:

> Heroin and 6-monoacetylmorphine are 'dangerous drugs' as defined in s 2 of the Dangerous Drug Act 1952. 6-monoacetylmorphine is an ester of morphine as in Part III of the First Schedule to the above Act.

In the present case, the 6-monoacetylmorphine is left out of the charge and the accused is only charged for trafficking in heroin. (6-monoacetylmorphine has since been listed as a dangerous drug under the First Schedule to the Dangerous Drugs Act 1952.)

The same chemist's report used in the first trial is now tendered as evidence and marked by this court as P38. The learned deputy public prosecutor felt that there is no necessity to call the chemist and based her stand on the contention that since the chemist's report was served well within the time limit stated in s 399 of the Criminal Procedure Code (FMS Cap 6) and that since the defence had not given notice to object to the said report to warrant calling the chemist, the report is admissible. There is no necessity of re-serving the same report on the accused in respect of this retrial.

As this point was argued at length by both prosecution and defence, I would reproduce s 399 of the Criminal Procedure Code (FMS Cap 6) which reads as follows:

> (i) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (ii) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial

or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness —

(a) by the Court; or
(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.

(ii) The following are persons to whom the provisions of this section apply:

(a) officers of the Institute for Medical Research;
(b) Government Medical Officers;
(c) chemist in the employment of any Government in the Federation or of the Government of Singapore;
(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;
(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in the Federation; and
(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

(iii) The person referred to in subsection (ii) of this section and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

After careful reading of s 399 of the Criminal Procedure Code (FMS Cap 6), I find that there is no necessity for the prosecution to re-serve the chemist's report on the accused for this retrial. This chemist's report was the same report served on the accused some seven years ago before the first trial and as the accused is the same person and there has been no alterations to the chemist's report, there is no necessity of re-service. The chemist need not be called to testify if the accused has not tendered the three days' notice before trial of this case requiring his attendance as provided for under s 399 of the Criminal Procedure Code (FMS Cap 6).

In this case the defence has not tendered notice to call the chemist. In fact when this report was tendered to the court, I did ask the defence counsel whether he has any objections and he replied no. Under such circumstances I do not see how the defence can deny the admissibility of this report at this stage.

In coming to this conclusion I agree with the decision of Mr Justice Syed Othman (as he then was) in the case of *Mohamed bin Abdul Rahman* v *PP*.[1] In that case, the defence tendered notice requiring the attendance of the chemist. The prosecution at trial failed to call the chemist and the court admitted the chemist's report without any objections from the defence counsel. It was held that the silence and inaction of the defence in objecting to the report was construed as a withdrawal or waiver of the notice and it has no objection to the report being admitted.

Further, after perusal of the said chemist's report, I am of the view that there are no major flaws in the analysis. The analysis on heroin are clearly spelled out with individual weight classified thereto, 6-monoacetylmorphine the other substance found therein, are clearly distinguished in the report. As this case only concerns the drug heroin, the chemist's report is clear and to the point on this matter.

Though the defence counsel hardly submitted on and challenged the evidence relating to custody and control of the drug found, I have taken upon myself to scrutinize the evidence to determine whether the prosecution has made out a case against the accused.

After careful consideration I find that the accused has the custody and control of the heroin and other exhibits tendered in court so found in the said room E. The accused was the only person in the said room at the material time. According to the landlord (PW4) and his wife (PW5), the accused was the sole subtenant to the said room E and there were no other person or persons who visited the accused in the said room. The drugs and other exhibits were in close proximity to the accused and from facts and inferences, I find that the accused was in possession of the said drugs. Under s 37(d) of the Dangerous Drugs Act 1952, the accused is deemed to have known the nature of the said drugs until the contrary is proved.

When defence was called the accused's counsel tendered evidence to show that the accused was a drug addict since 1973. When he was 15 to 16 years old his father admitted him to Tanjong Rambutan hospital for treatment at the recommendation of a doctor at General Hospital Ipoh. However unable to withstand the withdrawal symptoms, he ran away from the Tanjong Rambutan Hospital. He was subsequently readmitted to the same hospital but not long before he ran away again.

Subsequently, in 1977 he was arrested and charged in the Ipoh High Court for possession of a stew of heroin found in his cigarette box. In respect of this offence, he served a one-year jail sentence.

After his release from prison his brother-in-law rendered him assistance by giving him a job in his firm in Singapore as a wireman. This according to his brother-in-law (DW3) was to assist the accused to be away from drugs since it was more difficult to obtain drugs in Singapore. However, due to the fact of not having a work permit, the accused had to return to Johore Bahru to have his passport stamped for re-entry twice a month. While in Johore Bahru he got into smoking drugs again. According to the accused he was subsequently not allowed into Singapore due to his failure to pass a drug urine test conducted by the Singapore authorities at the Singapore customs check point.

In 1982, he was again arrested by the police in Johore Bahru for smoking drugs but after a detention of about two weeks he was released without being charged for any offence.

The accused gave as lengthy account of how heroin is being taken with different grades. The accused also stated that he needed four to five injections of heroin a day and each injection will be effective on him for four to five hours. He admitted that all the exhibits so found in room E on that day belonged to him but, stated that all these were for his own consumption. He did not sell any of the drugs. The accused also gave evidence to say that in order to supplement his purchase of drugs, he asked for money from his sister who lived in Singapore and she gave him a few hundred dollars at a time. With this and any spare cash he had, he will purchase drugs for fear that he may not be able to find the supplier.

All these evidence are adduced with the intention of disproving that he was a drug trafficker. After careful consideration of all evidence before this court, I find that the accused has failed to rebut the presumption that the 51.76g of heroin in his possession were for his own personal consumption.

My finding is based on the following facts. First, the amount of heroin is substantially large in quantity to justify personal consumption. There is no necessity for the accused to possess so much of heroin for his own consumption in view of the fact that he could have purchased it when he required them. Secondly, the heroin so found were contained in numerous small plastic packets, 62 in number. The accused explained that these packets were separately kept for the purpose of differentiating them into grades for different methods of consumption. I find that this is a rather unusual way of storage for personal consumption since it would be easier to store them in different larger containers. These small packets are more likely to be for sale in the streets.

Thirdly, besides the heroin there are also 67 syringes with needles. Why would the accused be in possession of so many, when according to the accused these syringes and needles were easily available from any Chinese medicine shop. The accused's explanation that it is cheaper to buy by the dozen can hardly justify (a) a person's fear of possessing them in case of being incriminated for trafficking in drugs; and (b) his priority in spending all his money on drugs rather than on accessory of which one or two syringes and needles would be sufficient.

Further, since the syringes and needles were no longer of use, one would expect it to be disposed of quickly rather than being kept. All the evidence points to trafficking instead of self consumption.

Fourthly, there were no evidence adduced to show that the accused was a chronic addict and that he required a substantial amount of heroin each day for consumption. Though the record officer of Tanjong Rambutan hospital (DW4) was called, the evidence tendered only goes to prove that the accused was admitted for drug treatment some seven years before the offence. I wish to state that once the presumption of trafficking is evoked, it is up to the accused to rebut it with evidence of a substantive and qualitative nature, relating and relevant to the matter. In this case in the light of the evidence adduced, the accused failed to rebut this presumption of trafficking. The accused has failed to justify the defence of self consumption as laid down in the Supreme Court decision in the case of *Cohen Lorraine Philis & Anor* v *PP*.[2]

In the light of the surrounding circumstances and facts of this case, I further wish to add that though the accused is a drug addict it does not mean that he is not a trafficker. I therefore find the accused guilty of the offence as charged. After hearing mitigation, I sentence the accused to death as laid down by law.

Accused convicted.

Solicitors: *Abdul Rahman Saad & Associates.*

Reported by *Mathavan Devadas*